

No. 12,230

IN THE

United States Court of Appeals  
For the Ninth Circuit

---

DON DOROTHY and PACIFIC NORTHERN  
AIRLINES, INC., (a corporation),

*Appellants,*

VS.

C. A. McCANDLESS,

*Appellee.*

Upon Appeal from the District Court for the  
Territory of Alaska, Third Division.

BRIEF FOR APPELLANTS.

---

JOHN E. MANDERS,

EDWARD V. DAVIS,

Anchorage, Alaska,

*Attorneys for Appellants.*

FILED

OCT 16 1949

PAUL P. O'BRIEN,  
CLERK



## Subject Index

---

	Page
Statement of basis for jurisdiction.....	1
Statement of the case.....	3
Specifications of errors relied on.....	5
Argument .....	12
Conclusion .....	22

## Table of Authorities Cited

<b>Cases</b>	<b>Pages</b>
Byland v. Miller (Ky.), 13 Fed. Supp. 137.....	13
General Motors Acceptance Corp. v. Dallas, 245 Pac. 184..	15
Gentry v. Billing (9th Cir. Cal.), 73 Fed. (2d) 925.....	14
Guthrie v. Halloran (Mont.), 3 Pac. (2d) 407.....	21
Hanson, et al. v. Ostrander Ry. & Timber Co., et al. (Wash.), 265 Pac. 159 .....	20
Harvey v. Lidvall, 87 Pac. 895 (Ore.).....	17
Jeffries v. Pankow, 229 Pac. 903 (Ore.).....	18, 19
U. S. v. Loughrey, 43 L.Ed. 420, 172 U.S. 206.....	16
Williams v. Gray, Sheriff of Gallatin County (Mont.), 203 Pac. 524 .....	12

## Codes and Statutes

Judicial Code, Section 128.....	3
31 Stat., L. 321, Act of June 6, 1900.....	2
35 Stat., L. 839, 840 .....	2
28 U.S.C.A., Section 225.....	3

## Texts

Compiled Laws of Alaska, 1933, Section 1091.....	2
--	---

IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

---

DON DOROTHY and PACIFIC NORTHERN  
AIRLINES, INC., (a corporation),

*Appellants,*

vs.

C. A. McCANDLESS,

*Appellee.*

Upon Appeal from the District Court for the  
Territory of Alaska, Third Division.

**BRIEF FOR APPELLANTS.**

---

**STATEMENT OF BASIS FOR JURISDICTION.**

On October 6, 1947, C. A. McCandless, the appellee above named, commenced this action in the District Court for the Territory of Alaska, Third Division, against Don Dorothy and Pacific Northern Airlines, Inc., a corporation, appellants above named, to recover from them \$8,500.00 damages by reason of an alleged conversion of an airplane by appellants for their use on September 6, 1947, between Anchorage, Alaska, Kasilof and Kenai, Alaska.

The District Court for the Territory of Alaska is a court of general jurisdiction. The Act of June 6,

1900, 31 Stat., L. 321, as amended 35 Stat., L. 839, 840, Compiled Laws of Alaska, 1933, Sec. 1091, insofar as here material, reads as follows:

“There is established a District Court for the Territory of Alaska \* \* \* with general jurisdiction in \* \* \* civil causes.”

The defendants demurred to plaintiff's complaint on the grounds:

1. That said complaint did not state facts sufficient to constitute a cause of action; and

2. That said complaint did not state facts sufficient to constitute a cause of action against defendants. (Tr. 5, 6.) Said demurrers were overruled. (Tr. 7.)

Thereupon defendants filed their answers, (Tr. 7, 12) and a reply was filed by plaintiff. (Tr. 16, 17.) Trial was had before a jury, which returned its verdict in favor of plaintiff and against defendants for the sum of \$7,500.00. (Tr. 21.)

At the close of plaintiff's case, defendants moved for a nonsuit based on the ground that the plaintiff had failed to prove his case as laid, and for a directed verdict on the ground that the plaintiff had failed to sustain the allegations of his complaint as to the relief demanded and had not at that time shown any conversion of the property referred to in the complaint. (Tr. 19, Tr. 18.)

After the jury returned its verdict, the defendants moved the court for judgment notwithstanding the verdict of the jury. (Tr. 20.) This motion was denied

by the court. (Tr. 20.) Defendants filed their motion for a new trial and the same was denied. (Tr. 25.)

This appeal followed, and this court has jurisdiction by virtue of the provisions of Sec. 225, Vol. 28, U.S. C.A., (Judicial Code, Sec. 128) as amended, the pertinent parts of which are:

“The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions \* \* \*

Third. In the district courts for Alaska or any division thereof, \* \* \* in all cases, \* \* \*”

---

#### **STATEMENT OF THE CASE.**

Plaintiff's complaint was filed on October 6, 1947, and alleges briefly that plaintiff was at all times mentioned in the complaint the owner of a Stinson Aircraft NC-18411, said aircraft being a Stinson SR-9 type, equipped with a 450 horse power Pratt & Whitney engine; that at all times mentioned in the complaint, Don Dorothy, the co-defendant, was an employee and agent of defendant, Pacific Northern Airlines, Inc., a corporation; that on or about the 4th day of September, 1947, the defendant Don Dorothy represented to the plaintiff that he was the representative of and acting on behalf of co-defendant, Pacific Northern Airlines, and that Don Dorothy negotiated with the plaintiff for the purchase of the above described aircraft, and plaintiff claimed that defendant Don Dorothy and plaintiff verbally agreed that said aircraft could be taken by co-defendant Don Dorothy



to the Pacific Northern Airlines hangar located at Merrill Field, Anchorage, Alaska, for the purpose of inspection by employees of Pacific Northern Airlines and that later on defendant Don Dorothy wrongfully and unlawfully took said aircraft on the 6th day of September, 1947, and converted said aircraft to defendants' use between the towns of Anchorage, Kasilof and Kenai, Alaska; that while so flying the aircraft, defendant Don Dorothy totally destroyed it.

To this complaint defendants filed their respective demurrers, the same being overruled, after which defendants filed their answers and affirmative defenses. Said affirmative defenses alleged that the defendant Don Dorothy, for and on behalf of defendant Pacific Northern Airlines, had entered into a charter agreement with plaintiff for the use of said aircraft at \$35.00 per hour, and that defendant Don Dorothy, acting for and on behalf of Pacific Northern Airlines, took possession of said aircraft under said charter agreement and landed the aircraft on the beach at Kenai, Alaska; that during the landing of the aircraft on said beach the right wheel of said aircraft became locked, causing certain damage to the aircraft; that the beach selected by defendant Don Dorothy for landing was in good condition, and that the damage done to said aircraft was through no fault of defendant Don Dorothy, but was due to mechanical failure of the brake; that the defendant Don Dorothy at all times used reasonable precaution in flying and landing said aircraft, and further that neither defendant Don Dorothy nor Pacific Northern



Airlines was responsible in any manner for the damage which occurred to plaintiff's aircraft. To this complaint plaintiff's reply was filed and the case was tried.

---

**SPECIFICATIONS OF ERRORS RELIED ON.**

1. The court erred in overruling the respective demurrers of defendants to the complaint of plaintiff on file herein. (Tr. 29.)

2. The court erred in denying defendant's motion at the close of plaintiff's case to grant a nonsuit on the ground that plaintiff had failed to prove a case as laid in his complaint. (Tr. 29.)

3. The court erred in denying defendant's motion at the close of plaintiff's case to grant a directed verdict on the ground that plaintiff had failed to sustain the allegations of his complaint or of the relief demanded, and that plaintiff had failed to show any conversion of the property, the subject matter of his complaint. (Tr. 29.)

4. The court erred in again denying defendants' motion for a nonsuit at the close of the case on the ground that plaintiff had failed to prove a case as laid in his complaint. (Tr. 29.)

5. The court erred in again denying defendants' motion for a directed verdict at the close of the case on the ground that plaintiff had failed to sustain the allegations of his complaint or of the relief demanded therein, and that plaintiff had not shown any con-

version of the property, the subject matter of said complaint. (Tr. 30.)

6. The court erred in denying defendants' motion for a judgment notwithstanding the verdict on the ground that plaintiff had failed to prove a case as laid in his complaint, and further that plaintiff had failed to sustain the allegations of the complaint or of the relief demanded therein, and that plaintiff had not shown any conversion of the property, the subject matter of plaintiff's complaint. (Tr. 30.)

7. The court erred in refusing to instruct the jury as follows (Tr. 199-205):

#### DEFENDANTS' INSTRUCTION No. 1

A mere detention of another's chattels which rightfully came into one's possession is not an actionable conversion. If, however, the detention be based upon a negation of the owner's rights, or be accompanied by an intent to convert the property to the holder's own use, a right of action will arise.

#### DEFENDANTS' INSTRUCTION No. 2

The jury is instructed that, if you believe from the evidence that the airplane in controversy was hired by the plaintiff, to Pacific Northern Airlines, the defendant, to be used by the latter, and that they were mutually benefited by the arrangement, then defendant was only required to use such care as ordinarily prudent men take of their property in taking care of the airplane, and if the jury further believes

from the evidence that the defendant used such care and diligence in taking care of the airplane, you will find for the defendant.

### DEFENDANTS' INSTRUCTION No. 3

You are instructed that the defendant in this case, in any event, was only bound to use ordinary care in the care of the airplane, and was bound only to take such precautions and adopt such safeguards as an ordinary prudent person would adopt to protect his own property.

### DEFENDANTS' INSTRUCTION No. 4

Bailee of an airplane for the mutual benefit of the bailor and bailee did not become liable as an insurer for any damage that the airplane might sustain while in its possession, but only for failure to exercise ordinary care.

### DEFENDANTS' INSTRUCTION No. 5

Any distinct act or dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion.

### DEFENDANTS' INSTRUCTION No. 6

The assertion of a title to or of dominion over personal property inconsistent with the right of the owner constitutes a conversion.

## DEFENDANTS' INSTRUCTION No. 7

A conversion consists in an illegal control of the thing converted, inconsistent with the plaintiff's right of property.

## DEFENDANTS' INSTRUCTION No. 8

A bailee of personal property for hire is not an insurer of the safety of such personal property while under his control. By this is meant, that he is not liable merely because such personal property sustains an injury or is damaged. He is liable, if at all, because he has done some act or thing with reference to its care which an ordinarily prudent person, similarly situated, would not have done. In other words, a bailee of personal property for hire is required to exercise such ordinary care and diligence with reference to the caring for such property to prevent injury thereto while under his control that a person of ordinary prudence would have exercised in caring for property of the same kind, in the same situation and under the same or similar circumstances and conditions. He is required to exercise such ordinary care with reference to the property as an ordinarily prudent person engaged in the same business would have exercised under similar circumstances and conditions.

## DEFENDANTS' INSTRUCTION No. 9

The court instructs you that a bailment may be defined as a delivery of personalty for some particular purpose, or on mere deposit, under contract, express

or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.

The person who delivers a personal chattel or chattels to another under circumstances coming within the definition of the term bailment is called the bailor, and the person to whom such chattel or chattels have been delivered is called the bailee.

#### DEFENDANTS' INSTRUCTION No. 10

Where a contract of bailment of property is for the mutual benefit of the bailor and the bailee, the bailee is only bound to use reasonable and ordinary care to protect the property.

#### DEFENDANTS' INSTRUCTION No. 11

The court instructs you that a "bailment" may be defined as a delivery of personalty for some particular purpose, or on mere deposit, under a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.

The person who delivers a personal chattel or chattels to another under circumstances coming within the definition of the term "bailment" is called the "bailor" and the person to whom such chattel or chattels have been delivered is called the "bailee".



## DEFENDANTS' INSTRUCTION No. 12

Where a contract of bailment of property is for the mutual benefit of the bailor and the bailee, the bailee is only bound to use reasonable and ordinary care to protect the property.

Where property in the custody of a bailee is accidentally damaged or destroyed, without any negligence on the part of the bailee causing the same, the bailee is not liable for such loss, but the loss must be borne by the bailor. It is for you to determine, however, from all the evidence in the case, whether defendant was negligent in the care of plaintiff's airplane and whether defendant or its agents acted in the care and protection of plaintiff's airplane as an ordinarily prudent person would have acted under the same or similar circumstances.

## DEFENDANTS' INSTRUCTION No. 13

The court instructs you that if the defendant informed the plaintiff of the purpose for which it was to use the airplane, and trusted the plaintiff to furnish them with an airplane suitable and adequate for such purpose, and the plaintiff understood to do this, and thereupon furnished this airplane for that purpose, there was an implied warranty by the plaintiff that the airplane was reasonably suitable and adequate for the purpose for which it was agreed upon.

## DEFENDANTS' INSTRUCTION No. 14

Custody distinguished—Letting of chattel for hire constitutes "bailment" under which bailor retains

general ownership and bailee has possession as distinguished from mere custody and where chattel is let for hire, bailee acquires, against strangers at least, special property in the subject of bailment.

#### DEFENDANTS' INSTRUCTION No. 15

Contract for rental of an airplane, and consideration of payment of fixed amount is a "bailment for hire", and hence for mutual benefit for both.

#### DEFENDANTS' INSTRUCTION No. 16

"Under contract to let airplane for hire, it is the duty of the bailor to furnish an airplane reasonably fit and proper for the use intended."

#### DEFENDANTS' INSTRUCTION No. 17

A "bailment" is the delivery of a thing in trust for some specific object or purpose and upon a contract expressed or implied to conform to the object or purpose of the trust.

#### DEFENDANTS' INSTRUCTION No. 18

The measure of damages for conversion is market value of the property at time and place of conversion, but if returned, value at time of return is deducted.

#### DEFENDANTS' INSTRUCTION No. 19

If you find that this property has a market value at the time and place of conversion, that would be the measure of damages.



The general rule is well established that the market value of the property at the time and place of conversion of personal property is the proper measure of damages.

### DEFENDANTS' INSTRUCTION No. 21

If you find that an agreement of rental or charter for the use of the airplane involved in this action was entered into, then, and in that event judgment should be in favor of defendants.

---

### ARGUMENT.

Plaintiff's complaint does not state facts sufficient to constitute a cause of action, and does not state facts sufficient to constitute a cause of action against defendants, Pacific Northern Airlines, Inc. and Don Dorothy.

It is the contention of defendants that in order to state a cause of action against defendants that plaintiff must allege, not only ownership, but also *that he was entitled to possession of the chattel*, giving its value, and that on that date defendants wrongfully took and carried it away, refused to restore it on demand, and wrongfully deprived plaintiff of its possession and use to his damage in a specified sum. If any one of the above allegations are omitted, the complaint must fail.

In the case of *Williams v. Gray, Sheriff of Gallatin County*, (Mont.) 203 Pac. 524, 526, the court stated:

“The sufficiency of the complaint as to the demurrer must be determined without reference to subsequent pleadings or to the facts appearing in evidence.”

The first factor that must be determined without reference to anything but the complaint is: *Does the complaint state a cause of action, and does it state a cause of action against the defendants and each of them?*

The instant action is the common law action of trover, and as such the complaint must contain all the material allegations which were necessary at common law. This is well borne out by the case of *Byland v. Miller*, (Ky.) 13 Fed. Supp. 137, 138 (1), wherein Judge Ford stated:

“This is a common law action in trover, and the complaint for conversion must contain all the material allegations which were necessary at common law. 65 C.J. 74, Sec. 121.”

and further:

“While the petition in this case alleges a right of property in the chattels alleged to have been converted, there is no allegation of *possession or right of possession* in the plaintiff at the time of the alleged conversion. \* \* \*

“The plaintiff seeks to sustain the sufficiency of his petition in this regard upon the authority of a statement made in 21 R.C.L. 678, Sec. 40, to the effect that in such cases the petition need only allege ownership, delivery to defendant, and the fact of conversion. This statement of the law

appears to be based only on the authority of the single case of *Austin v. Vanderbilt*, 48 Or. 206, 85 P. 519, 6 L.R.A. (N.S.) 298, 120 Am. St. Rep. 800, 10 Ann. Cas. 1123. An examination of that case discloses that the court was considering the sufficiency of the petition after judgment, and hence leaves it somewhat doubtful as to whether it supports the broad statement of this text. Even if it does, it appears to be contrary to the prevailing weight of authority on the subject. *That mere right of property in a chattel will not support an action in trover without an allegation of either actual possession or a showing of some fact disclosing the plaintiff's right to immediate possession at the time of the alleged conversion seems to be settled by numerous authorities.* 65 C.J. p. 58, 'Sec. 93, and p. 79, Sec. 130. A discussion of the point is found in the case of *Lexington & O. R. Co. v. Kidd*, 7 Dana (Ky.) 245, 246. See, also, *Gentry v. Billing* (C.C.A.) 73 F. (2d) 925; *United States v. Loughrey*, 172 U.S. 206, 19 S.Ct. 153, 43 L.Ed. 420; *Kennett v. Peters*, 54 Kan. 119, 37 P. 999, 45 Am. St. Rep. 274; 26 R.C.L. pp. 1131, 1132, Sec. 41.

For the reasons stated, I am of the opinion that the demurrer should be sustained." (Italics ours.)

There is no allegation anywhere in plaintiff's complaint that he was entitled to the possession of said airplane.

In the case of *Gentry v. Billing*, (9th Cir. Cal.) 73 Fed. (2d) 925, 927, the court stated, in adopting the opinion prepared by Judge Mack prior to resubmission of the case:

“Trover is essentially a possessory action; plaintiff must allege and prove that at the time of the alleged conversion he either had the actual possession of the property or was the owner thereof and as such entitled to its immediate possession. *General Motors Acceptance Corp. v. Dallas*, 198 Cal. 365, 245 P. 184 (1926).”

In the case of *General Motors Acceptance Corp. v. Dallas*, 245 Pac. 184, 186, the court, speaking through Judge Lawler, stated:

“As this is an action in *conversion*, and not one in replevin, as assumed by the District Court of Appeal, it was incumbent upon the appellant to sustain the affirmative of the issue and prove either ownership and the right of possession or actual possession of said automobiles in itself at the time of the alleged conversion thereof. *Green v. Burr*, 63 P. 360, 131 Cal. 236, 238; *Zaro v. Dakan*, 18 P. 680, 76 Cal. 565, 566, and 567; *Moody v. Goodwin*, 200 P. 733, 53 Cal. App. 693, 694; *Brinkley-Douglas Fruit Co. v. Silman*, 166 P. 371, 33 Cal. App. 643, 651; 24 Cal. Jur. pp. 1025 and 1043. If the appellant failed to prove either that it was the owner of the automobiles and entitled to their possession or that it was in the actual possession thereof when the alleged conversion took place, judgment was properly entered against it. The evidence clearly shows, as already indicated, that the appellant was *not* in the *actual* possession of the automobiles at the time of the asserted conversion. The burden therefore rested upon it of proving ownership and the right of possession in itself. To adopt appellant’s contention that the sheriff should have



introduced evidence at the trial to show a want of ownership in appellant within the meaning of the Motor Vehicle Act, and having failed so to do is now precluded from relying on that act, would, in effect, be to shift the burden of proof to the sheriff and make it necessary for him to prove a want of ownership in the appellant. It is plain, therefore, that the sheriff, at this time, may have recourse to the Motor Vehicle Act, or any other law, to sustain his contention that the appellant, in the absence of actual possession, utterly failed to meet the burden of proof resting upon it to shown ownership and right of possession in itself at the time of the asserted conversion.”

Appellants contend that the same principle of law is involved in this case as in *U. S. v. Loughrey*, 43 L.Ed. 420, 172 U.S. 206, which was an action brought to recover the value of timber cut from lands in the State of Michigan. On page 421, the court said:

“To entitle the plaintiff to recover in this action, which is substantially in trover, it is necessary to show a general or special property in the timber cut, *and a right to the possession of the same* at the commencement of the suit. \* \* \*

Although, as was said by Lord Kenyon in *Ward v. Macauley*, 4 T.R. 489, ‘the distinction between the actions of trespass and trover is well settled; the former are founded on possession; the latter on property;’—yet they are concurrent remedies to the extent that, wherever trespass will lie for the unlawful taking and conversion of personal property, trover may also be maintained. The plaintiff is bound to prove a right of pos-

session in himself *at the time of the conversion*, and if the goods are shown to be in the lawful possession of another by lease or similar contract he cannot maintain trover for them." (Citations.) (Italics ours.)

There must be more than a mere allegation of ownership of a chattel to entitle one to recover for conversion. *There must be an allegation that the plaintiff is entitled to possession.* If the plaintiff in an action is not entitled to possession, it would be impossible to bring an action for conversion; hence that necessary and material allegation.

Certainly a man may be the owner of a chattel and not be entitled to possession of the same, and if he was not entitled to possession, he could not bring an action of conversion.

A complaint in conversion must allege that plaintiff is entitled to possession. See *Harvey v. Lidvall*, 87 Pac. 895, 896, (Ore.) where Judge Bean (later a Judge of the United States District Court) stated:

"It has been held that, in an action by a mortgagee after condition broken, to recover possession of the mortgaged property, or in trover for its wrongful conversion, it is sufficient for plaintiff to allege generally that he is the owner and entitled to the possession, without setting out the source of his title. *Reinstein v. Roberts*, 34 Or. 87, 55 Pac. 90, 75 Am. St. Rep. 564; *Mayes v. Stephens*, 38 Or. 512, 63 Pac. 760, 64 Pac. 319. And we think the complaint, in the case at bar, comes within this rule. It is alleged that plaintiff was the owner and in possession of the property

in controversy and entitled to such possession at the time of the alleged conversion by the defendant.”

The very allegation held sufficient in the foregoing case, is lacking in the case at bar, there being no allegation in the complaint in the instant case that at the time of the alleged conversion plaintiff was entitled to possession.

Defendants contend that the airplane once having lawfully come into their possession, plaintiff must allege in his complaint a demand for the return of the same before he can bring an action of conversion.

Whether demand must be alleged depends upon whether it is essential to a cause of action. In this case it is defendants' contention that by the failure to make a demand for the return of the chattel, it being lawfully possessed by defendants, no cause of action for conversion by plaintiff was stated in the complaint.

In the case of *Jeffries v. Pankow*, 229 Pac. 903, 904 (Ore.), the court stated:

“The plaintiff attempts to declare as for trover and conversion. It is said that he delivered the property to the defendant on July 7, 1920, of course with the understanding alleged. This being true, the defendant was in the lawful possession of the car by the consent of the plaintiff. The attempted declaration of trover and conversion is not laid in the cepit in this instance. If it lies at all, it must have been in the detinet. The difference between the two is that in the first the action is grounded on the unlawful taking of the



property without the consent of the owner. In the second instance it is based on unlawful detention, and before a cause of action will arise upon the detention of the property which has its origin in the consent of the plaintiff, it must appear that a demand was made for its return. \* \* \*

*We are considering at present only the sufficiency of the complaint without reference to any other writing in the record.*" (Italics ours.)

That is the situation with which we are now dealing. *Did the pleading state a cause of action?* Plaintiff's own complaint states that defendant Don Dorothy could lawfully take the airplane.

Again in the *Jeffries* case, *supra*, at page 905, the court said:

"In *Owens v. Weedman*, 82 Ill. 409, according to the syllabus it is said 'To maintain trover the plaintiff must show a tortious conversion of personal property, and that, at the time of such conversion, he had a right of property in the chattel converted, *and also had the possession thereof, or a right to its immediate possession.*'" (Italics ours.)

Plaintiff could certainly never contend that he had no opportunity to demand the return of said airplane, for by his own testimony (Tr. 42) he stated:

"I didn't see it done, but over at United Air-motive they told me he had come got the key and took the plane down to the hangar and took it up for a test flight, and I was pretty het up because he took it off the ground without permission, because he didn't have any cockpit check.

He might be a good flier, but I wouldn't let anybody take my plane off the ground unless I was with him the first time."

The testimony further shows (Tr. 43) that plaintiff had checked the plane on Thursday, Friday and Saturday, and that it was tied down on the line. He had plenty of time to make a demand for the return of said plane but he did not do so then or at any other time.

In the case of *Hanson, et al. v. Ostrander Ry. & Timber Co., et al.*, (Wash.) 265 Pac. 159, Chief Justice Mackintosh, speaking for the court, said:

"The amended complaint in this cause sought to recover damages to a house boat owned by the appellants and injured through the alleged negligence of the respondents. It also sought to recover the full value of the house boat under an allegation that the respondents had taken it into their possession, and that no portion of the boat or its contents had been returned to the appellants. Upon the trial, the court compelled the appellants to elect which cause of action they would proceed in, and, having chosen to proceed upon the theory of conversion, a nonsuit was granted at the close of the appellants' testimony.

On this appeal, the first point raised by the appellants is that the court was in error in compelling them to elect. As already indicated, the complaint stated two causes of action, and, the appellants having interpreted one of these causes of action as being one for conversion, there was no error in compelling the election.

The second point made by the appellants is that the court erred in dismissing the action for failure of proof. A review of the testimony confirms the opinion held by the trial court that there was no evidence from which a jury would be entitled to find as a fact that any of the acts done by the respondents amounted to a conversion of the appellants' property. From the evidence it is very doubtful whether the appellants produced any testimony showing that they were the owners of the property alleged to have been converted. But, aside from this the testimony clearly shows that the respondents did not take the property into their possession against the consent of the appellants, and the possession, having been rightful at its beginning, could not become wrongful until a demand for its return had been made and refused.

Finding no error in the conduct of this trial or in the result arrived at by the trial court, the judgment is affirmed."

In the case of *Guthrie v. Halloran*, (Mont.) 3 Pac. (2d) 407, 409, the court, speaking through Judge Galen, stated:

"Every unauthorized assumption of dominion over personal property in hostility to the right of the true owner is conversion. 2 Estes Pleadings by Boone (4th Ed.) Sec. 2100. And the detriment caused by the wrongful conversion is presumed to be the value of the property at the time of its conversion with interest from that time. Section 8689, Rev. Codes 1921. The questions to be tried in an action for conversion of personal property such as this relate to the ownership and right of

possession, and a wrongful taking by the defendants.

The district court was in error in not sustaining the defendants' motion for a nonsuit because of the plaintiff's failure to prove his case."

Appellants respectfully call to the court's attention that no motion of any kind or character, before, during or after the trial, that the pleadings be made to conform to the proof, was made by the plaintiff other than the substitution of the word "Kenai" for the word "Kasilof" in the complaint.

---

#### CONCLUSION.

It is apparent from the authorities herein cited to the court and the rules of law laid down therein, that the District Court was in error in failing to sustain appellants' demurrers, as well as failing to grant appellants' respective motions and requested instructions.

Dated, Anchorage, Alaska,  
October 17, 1949.

JOHN E. MANDERS,  
EDWARD V. DAVIS,  
*Attorneys for Appellants.*